83-1014

NO.

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1983

MARK BLUMENTHAL,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

HAROLD M. JENNINGS
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Attorney for Petitioner

JOHN NAYLOR
Of Counsel

QUESTIONS PRESENTED FOR REVIEW

WHETHER AN ARREST AND THE FRUITS OF THAT ARREST SHOULD BE QUASHED AND SUPPRESSED WHEN A PROPER MOTION TO QUASH AND SUPPRESS IS FILED AND HEARD, WHERE THE ARREST WAS BASED ON EVIDENCE SEIZED UNDER A SEARCH WARRANT LATER QUASHED IN PART FOR BEING BASED ON MERE SUSPICION RATHER THAN PROBABLE CAUSE.

LIST OF PARTIES

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff - Appellee

MARK BLUMENTHAL,

Defendant - Appellant

FOR APPELLANT - HAROLD M. JENNINGS
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Bloomington, IL 61701

FOR APPELLEE - Ronald C. Dozier
State's Attorney
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John M. Wood, Staff Attorney

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1. United States Code Service Court Rules, Supreme Court, Rule 17, .1.(c) May, 1983 Cumulative Supplement.

2. United States Constitution, Amendments IV, V, VI, XIV, U.S.C.A.

3. People v. Abney, 81 Ill. 2d 159, (1980), 407 N.E. 2d 543.

4. People v. Eichelberger, 91 Ill. 2d 359, (1982), 438 N.E. 2d 140.

5. Payton v. New York, 445 U.S. 573 (1980), 100 S. Ct. 1371.

6. Henry v. United States, 361 U.S. 98, 80 S. Ct. 168.

7. Wong Sun v. United States, 371 U.S. 473, 83 S. Ct. 403 (1963).

8. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).

9. Davis v. Mississippi, 394 U.S. 723, 89 S. Ct. 1394 (1969).

10. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341.

11. Bynum v. United States, 104 U.S. App. D. C. 368, 262 F2d 465 (1958).

12. Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302.

13. Byers v. U. S., 273 U.S. 28, 47 S. Ct. 248.

14. United States v. DI RE, 332 U.S. 581, 68 S. Ct. 222.

15. United States v. United States District Court, (1972), 407 U.S. 297, 92 S. Ct. 2125.

16. Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971).

17. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F. 2d 385 (1970).

18. United States v. Reed, 572 F. 2d 412, (1978) cert. denied, sub. nom. Goldsmith v. U.S., 439 U.S. 913, 99 S. Ct. 283.

19. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524.

20. Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223.

21. Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978).

22. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

23. United States v. Killebrew, 560 F. 2d 729, (1977).

24. People v. Boehm, 89 Ill. App. 3rd 176 (1980) 411 N.E. 2d 1192.

25. Illinois Revised Statues of 1981, Ch. 38 sec. 107-2.

26. Harrison v. United States, 392 U.S. 219, 88 S. Ct. 2008 (1968).

27. People v. Wilson, (1975), 60 Ill. 2d 235, 326 N.E. 2d 378.

28. People v. Stiles, 95 Ill. App. 3rd 959, (1981), 420 N.E. 2d 1204.

REFERENCE TO APPELLATE COURT DECISION IN THE INSTANT CASE

GENERAL NO. 4-82-0567, June 6, 1983, In the Appellate Court of Illinois, Fourth Judicial District. A copy of this Opinion is attached as part of the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

1) The date of judgment of the Decree sought to be reviewed herein was October 4, 1983, when Defendant Mark Blumenthal's Petition For Leave to Appeal to the Illinois Supreme Court was denied. Order entered same date, October 4, 1983.

2) , An Order granting Defendant Mark Blumenthal's Petition to Stay and Recall the Mandate pending application for certiorari to the United States Supreme Court was granted by Justice Robert C. Underwood of the Supreme Court of Illinois on October 28, 1983. This stay and recall of the Mandate Order of Justice Underwood is effective until an affidavit is

filed with the Clerk of the Illinois Supreme Court by Defendant proving that certiorari has been filed with the United States Supreme Court, or until the expiration of the time period within which said application for certiorari may be filed. If no such affidavit of filing for certiorari has been submitted to the Clerk of the Illinois Supreme Court within said aforementioned time limits, the mandate of that Court will issue without further order.

3) Jurisdiction for this Petition for Certiorari is invoked pursuant to Title 28 of the United States Code Service, sec. 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Illinois Revised Statutes 1981, Ch. 38, sec. 107-2.

107-2. Arrest by peace officer

sec. 107-2. Arrest by Peace Officer. A peace officer may arrest a person when:

(a) He had a warrant commanding that such a person be arrested; or

(b) He has a reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or

(c) He has reasonable grounds to believe that the person is committing or has committed an offense.

United States Constitution

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes 1981, Ch. 38, sec. 114-12.

114-12. Motion to suppress evidence illegally seized.

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state the facts showing wherein the search and seizure were unlawful. The judge shall recieve evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the motion is granted the property shall be restored, and it shall not be admissable in evidence against the movant at any trial.

(c) The motion shall be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of suppression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph

(a)(3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended,[1] and subsequent prosecution of such defendants upon such charges shall be barred.

(d) The motion shall be made only before a court with jurisdiction to try the offense.

(e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari hereby appeals to the Supreme Court of the United States from the final order of the Illinois Supreme Court entered October 4, 1983, Case No. 58829 there, denying Defendant's Petition for Leave to Appeal his arson conviction.

Defendant Mark Blumenthal originally was arrested, indicted, and tried in the Circuit Court of McLean County, Eleventh Judicial Circuit, Case No. 81-CF-410 in Bloomington, Illinois. He was found innocent of the aggravated arson charge, and guilty of arson and the lesser included offense of criminal damage to property by a jury on April 15, 1982.

Prior to trial on December 4, 1981, in accordance with sec. 114-12 of Ch. 38 of the Ill. Rev. Stat. of 1981, Defendant's previous attorney filed a Motion To Suppress Evidence Illegally Seized and to Quash a Search Warrant subsequently issued thereto.

On February 3, 1982, Defendant's present attorney, Harold M. Jennings, timely filed a pre-trial Motion to Suppress Evidence Illegally Seized and a Motion to Quash Arrest, also in compliance with sec. 114-12 of Ch. 38 of the Ill. Rev. Stat. of 1981. A hearing was held on this pre-trial Motion to Suppress and Quash, said motion being granted in part and denied in part by the Circuit Court. Defendant's Motion to Suppress and Quash the Arrest raised the same constitutional objections and issues resulting from violations of Defendant's rights by the searching, arresting Illinois State University police, as does the Petition for Certiorari.

Defendant also timely filed two motions to dismiss at trial, made an oral motion for mistrial, and timely filed a written motion for a new trial raising the same constitutional objections to violations of Defendant's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as this Petition for Certiorari asserts.

Judge Richard Baner denied all of Defendant's oral and written motions listed above except that part of the search warrant motion dealing with the search of Defendant's dorm room, which Judge Baner granted by Order dated March 10, 1982 (C. Vol. 1, p. 182, 183).

After a continued sentencing hearing beginning July 22, 1982, Defendant was sentenced on August 12, 1982, for the arson conviction, to a term of periodic imprisonment for one year, four years of probation with mandatory bi-monthly counselling and payment of restitution for the damages and repairs made from this occurrence of $6,793.49. Defendant's judgment and sentence of thirty months concurrent probation on his conviction of criminal damage to property was later vacated by the Illinois Appellate Court, Fourth District, on their own motion because of plain error.

Defendant timely filed his Notice of Appeal and Praecipe for the record to the Illinois Appellate Court, Fourth District, on

September 2, 1982, Case No. 4-82-0567, in that Court. Defendant's Appeal of his arson conviction and sentence were denied by Order and Opinion (Attached to Appendix) on June 6, 1983. Defendant's conviction and sentence of the criminal damage to property charge was vacated by the Appellate Court on the basis of plain error, on the Court's own motion. Defendant timely filed a Petition for Rehearing to the same Illinois Appellate Court, Fourth District, raising the same constitutional issues as had been raised at pre-trial, trial and on appeal, but Defendant's Petition for Rehearing was denied by Order of July 5, 1983.

Defendant timely filed for Leave to Appeal to the Illinois Supreme Court on August 9, 1983, raising only the same constitutional violations of Defendant's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments, by the illegally searching, seizing, arresting Illinois State University police. Said Petition for Leave to Appeal was denied by the Illinois Supreme Court by Order of August 4, 1983.

Defendant's Petition for Certiorari herein is for a review of that denial on the constitutional issues raised therein, and all through the proceedings of this cause, at all stages of same.

ARGUMENT

WHETHER AN ARREST AND THE FRUITS OF THAT ARREST SHOULD BE QUASHED AND SUPPRESSED WHEN A PROPER MOTION TO QUASH AND SUPPRESS IS FILED AND HEARD, WHERE THE ARREST IS BASED ON EVIDENCE SEIZED UNDER A SEARCH WARRANT LATER QUASHED IN PART FOR BEING BASED ON MERE SUSPICION RATHER THAN PROBABLE CAUSE.

In this case, Rule 17, .1.(c) of the May, 1983 Cumulative Supplement of the United States Code Service Court Rules for the Supreme Court is relied upon by Defendant herein as his reason for this Petition for Writ of Certiorari. The searching, seizing, arresting Illinois State University police violated Federal Constitutional rights of Defendant, Appellant-Petitioner Mark Blumenthal, guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Defendant respectfully requests judicial review of this error of law herein, by this Writ of Certiorari.

The Trial Court judge hearing Defendant's timely suppression and quash motions prior to trial also violated these same Constitutional rights of Defendant when the Trial Court failed

to suppress the evidence illegally seized, viewed, and photographed by the Illinois State University police, and the resulting fruits of this evidence.

Defendant's constitutional rights to a fair trial were violated again by the Trial Court in McLean County when the fruits of this illegally seized, viewed, and photographed evidence were used to convict Defendant of Arson and Criminal Damage to Property. The Illinois Appellate Court, Fourth District, and the Illinois Supreme Court continued the violations of Defendant's Constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when they both respectively affirmed the Trial Court conviction of Arson as Defendant's case was timely appealed to both of those Courts. From these adverse and unconstitutional decisions on appeal and rehearing before the Illinois Appellate Court and by denial of Leave of Appeal by the Illinois Supreme Court, Defendant respectfuly petitions this Honorable

Court to review by certiorari his arguments and the evidence presented before those Courts also.

In support of same, Defendant states that the law is clear that the adverse decisions rendered in this cause below are in conflict with recent applicable decisions of the United States Supreme Court, as well as in conflict with recent decisions of the Illinois Supreme Court interpreting these same recent U. S. Supreme Court decisions applicable to the same Federal Constitutional issues in this cause.

Most recently, in People v. Abney, 81 Ill. 2d 159 (1980), 407 N.E. 2d 543, and People v. Eichelberger, 91 Ill. 2d 359 (1982), the Illinois Supreme Court ruled that Illinois' arrest statute, now sec. 107-2 of Ch. 38 of the Ill. Rev. Stat. of 1981 is in compliance with the Constitutional guidelines laid down in Payton v. New York, (1980), 45 U. S. 573, 100 S. Ct. 1371, because the "principles of the exigent circumstances rule" has been judicially engrafted upon our arrest statute. People v.

Eichelberger, 91 Ill. 2d 359, 367; People v. Abney, 81 Il. 2d 159, 168. The arrest statute ruled on in the Abney decision, Ch. 38, sec. 107-2 of the Ill. Rev. Stat. of 1977, is practically identical to the 1981 version of sec. 107-2 of Ch. 38 of the Ill. Rev. Stat. of 1981, the applicable arrest statute in this cause.

Payton v. New York, (1980) 445 U.S. 573, 100 S. Ct. 1371, declared a New York arrest statute, similar to our Illinois one, unconstitutional on Fourth Amendment grounds in that case. Abney, op. cited, p. 166, citing Payton, declared that if a warrantless home entry to arrest is to be justified, such as the warrantless home or dormitory room arrest in the Defendant's case herein, then that warrantless home entry to arrest must be justified on the basis of exigent circumstances. Defendant's case herein is slightly complicated by the fact that the arresting Illinois State University police officers were already inside of Defendant's

dorm room executing a search warrant when they arrested Defendant on the basis of clinching, connecting evidence found in the search of Defendant's room. This search warrant, which was the only apparently lawful method the Illinois State University police had gained access to Defendant's dorm room with, was later quashed at the pre-trial hearing on Defendant's Motion to Quash the Search Warrant and Arrest and Suppress the Evidence and fruits of evidence illegally seized, viewed, or photographed therein, and from the arrest effectuated immediately thereafter.

Defendant has contended, in that pre-trial hearing to suppress and quash, in oral motions at trial, written motions after trial, and in arguments in Defendant's briefs throughout the appeal process, that once the Trial Court judge quashed the search warrant of Defendant's dorm room, the arresting police officers were, in effect, placed back outside Defendant's dorm room door, since he had refused all police requests to consent to a search. Standing

outside Defendant's dorm room, the investigating Illinois State University police possessed only a quantum of evidence ruled to be a "mere suspicion" by the Trial Court judge who quashed the search warrant of Defendant's room at the pre-trial hearing on Defendant's Motion to Suppress and Quash the Arrest. Henry v. U. S., 361 U.S. 98, 101, 80 S. Ct. 168 has held that an arrest with or without a warrant must stand upon firmer ground than mere suspicion.

However, the Trial Court judge who quashed the previously executed search warrant, refused to also grant that part of Defendant's Motion to Quash the arrest and the evidence and fruits flowing therefrom as would seem to be indicated by Wong Sun v. U. S., 371 U.S. 473, 83 S. Ct. 403 (1963), Mapp v. Ohio, (1961), 367 U.S. 643, 81 S. Ct. 1684, and Davis v. Mississippi, 394 U.S. 723, 89 S. Ct. 1394 (1969); Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341.

Under the rules of law enunciated in those four cases and many others, it would seem to be

clear that the fruits of the illegally seized evidence flowing unattenuatedly from the illegal, quashed search of Defendant's room, could not be used at trial to convict Defendant under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The evidence seized, viewed, and photographed in Defendant's dorm room "cinched" the arrest of Defendant there in his room, according to the arresting officer's own testimony at the pre-trial hearing on Defendant's Motion to Suppress and Quash. (R. Vol. V, p. 55). The same investigating, searching, arresting officer also testified at the pre-trial hearing that he did not feel the police possessed probable cause to arrest Defendant until the search of Defendant's room was completed. (R. Vol. V, p. 55)

Though the law under Wong Sun, Mapp, Davis, Weeks, op. cited, and many others, seems to clearly indicate that all the evidence seized in this chain of illegal search and illegal arrest in this case is tainted as a

matter of law and inadmissible at trial, the Trial Court judge refused to quash Defendant's arrest and suppress the evidence and fruits of that evidence gained solely from the quashed evidence in Defendant's room and the resulting arrest, such as Defendant's fingerprints, statements, photographs, etc. Bynum v. U. S., 104 U.S. App. D.C. 368, 370, 262 F. 2d 465, 467 (1958).

Thi denial of Defendant's pre-trial Motion to Quash the Arrest is the basic error of Federal Constitutional law made by the Trial Court and perpetuated by the Appellate and Supreme Court decisions affirming this denial, which Defendant respectfully argues should have been reversed as a matter of law. Brinegar v. U. S., 338 U.S. 160, 176, 69 S. Ct. 1302, 1311. Davis v. Mississippi, op. cited, p. 6.

Byers v. U. S., 273 U.S. 28, 47 S. Ct. 248, and U. S. v. DI RE, 332 U.S. 581, 68 S. Ct. 222, have both ruled that an illegal search is not validated by what it turns up. Under these two cases, the evidence viewed, seized

and photographed in Defendant's room, once quashed and suppressed as happened in this cause, cannot then be used to justify Defendant's arrest immediately thereafter. That arrest must be quashed as well under the principles of Wong Sun, Mapp and Davis, op. cited, and the evidence and fruits from that legally tainted arrest also suppressed. Byers v. U. S., op. cited; U. S. v. DI RE, op. cited.

According to Payton and People v. Abney, 81 Ill. 2d 159, 166, the chief evil which the Fourth Amendment protects against is the physical entry of the home. Abney, on p. 166, goes on to state that the U. S. Supreme Court, in United States v. United States District Court, (1972), 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, held that warrantless searches and seizures in the home are presumptively unreasonable. Citing Coolidge v. New Hampshire, (1971), 403 U.S. 443, 454, 55, 91 S. Ct. 2022, 2032, and Payton v. New York, (1980), 445 U.S. 573, 585, 100 S. Ct. 1371, 1379-80, Abney, p. 166 goes on to state that the Fourth

Amendment applies equally to the searches and seizures of persons and property, and that no constitutional difference exists between the intrusiveness of entries to search, and entries to arrest. See also Dorman v. United States, 140 U.S. App. D.C. 313, 317, 435 F. 2d 385, 389, (1970); United States v. Reed, 572 F. 2d 412, 423, (1978) cert. denied, sub. nom. Goldsmith v. U. S., 439, U.S. 913, 99 S. Ct. 283.

In Payton, op. cited, p. 1377, note 17, the U.S. Supreme Court adopted the former dicta of four justices in the Coolidge decision, which expressed the opinion that the same exigency requirement is applicable to warrantless entries to arrest for felonies as is applicable to warrantless entries to search. Boyd v. U. S., 116, 616, 630, 6 S. Ct. 524, 532, Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223.

In Defendant's case herein, not only was there no probable cause to search Defendant's dorm room, according to the Trial Judge at the suppression and quash hearing (R. Vol. V, p. 33),

but there were also no exigent circumstances supporting the search of Defendant's room and the arrest of his person therein either.

Without probable cause to search or arrest present, with no arrest warrant in hand, or knowledge of same, and no crime being committed in sight of the arresting officers, the Trial Judge still refused to grant Defendant's timely motion to quash the arrest and suppress the evidence and fruits flowing from that arrest. This was clearly an error of law, according to the decisions cited hereinbefore, Payton, Coolidge, U.S. v. U.S. District Court, Abney, and Eichelberger, op. cited, as well as Wong Sun, Mapp v. Ohio, Davis v. Mississippi, Weeks v. U.S., op. cited.

Even if the police possessed the requisite evidence to add up to probable cause to arrest as the Illinois Appellate Court opined in their affirming consideration of this cause, the investigating Illinois State University police did not possess or seek out the necessary arrest warrant, as required in the absence of

exigent circumstances according to Payton, Coolidge, Abney, and Eichelberger, op. cited.

This seemingly slight procedural defect in the arrest techniques of the I.S.U. police may seem insignificant, but according to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the recent cases interpreting same, such a procedural irregularity as the I.S.U. police were guilty of herein was serious enough a legal error to require quashing arrests and suppressing evidence seized therefrom in Payton and Coolidge, Wong Sun, Mapp v. Ohio, Davis v. Mississippi, Weeks v. U.S., et al., op cited.

The capable and diligent, good faith efforts of the investigating Illinois State University police in this case fell short of the requirements of Payton v. U.S., 100 S. Ct. 1371, 1388. Justice Stevens' last paragraph of his opinion in Payton on p. 1388, is clear as to the necessity of arrest warrants for routine felony arrests, such as Defendant Blumenthal's warrantless arrest in the instant case.

Mincey v. Arizona, (1978), 437 U. S. 385, 393, 98 S. Ct. 2408, 2414, and Terry v. Ohio, (1968), 392 U. S. 1, 26, 88 S. Ct. 1868, 1882 also both require that warrantless police actions must be strictly circumscribed ---- by exigencies which justify its initiation. In Defendant's case herein, Defendant's dorm room had already been secured by the Illinois State University police since 7 a.m., according to the statement of the I.S.U. police officer who applied for the search warrant. (C. Vol. I, p. 182, 183). This early seizure of Defendant's dorm room, so shortly after the crime occurred, may have been illegal seizure in itself as a matter of law, with what little evidence the investigating I.S.U. police possessed at 7 a.m. the morning of the crime, which occurred near 5 a.m. This taking over of Defendant's dorm room without a search warrant may have been illegal per se. At the least, this early securing of Defendant's dorm room, and Defendant's continued presence near his room during the day's investigation clearly show that no

exigent circumstances were present which negated Payton's requirement that routine felony arrests require arrest warrants as the law of the land. Payton v. New York, 100 S. Ct. 1371, 1388; Dorman v. U. S. 435 F. 2d 385, 393; U. S. v. Killebrew, 560 F. 2d 729, 734 (1977).

The investigation was conducted during regular daytime working hours on a weekday, and there were a fairly large number of Circuit Court judges available and working right in Bloomington who could have ruled on an arrest warrant application if the investigating I.S.U. police had sought one as required by Payton. The same officer who sought the search warrant of Defendant's dorm room and the locker area on Defendant's dorm floor could also have sought an arrest warrant for Defendant at that time if the evidence was so sufficient as to amount to probable cause, as the Illinois Appellate Court's affirmance of Defendant's arson conviction opines. The I.S.U. police sought no arrest warrant, however, because the

investigating officer testified later that even he knew they did not possess probable cause until the search of Defendant's dorm room, which was later quashed and suppressed.

Still, Defendant appeals this basic error of law made by the pre-trial denial of that part of Defendant's timely Motion to Quash his arrest and suppress the evidence gained illegally therefrom, which arrest was based solely on the clinching evidence gained from the quashed search warrant of Defendant's dorm room and the evidence viewed, photographed and seized therefrom.

In the closest case to the facts and circumstances of Defendant's case, another Illinois Appellate Court decision ruled that they could see no difference between a non-exigent entry and a non-exigent remaining on the premises to arrest. People v. Boehm, 89 Ill. App. 3rd 176 (1980) 411 N.E. 2d 1192. The court in People v. Boehm, citing Payton, concluded that the suppression motion denied there at trial must be reversed as a matter of

law, because once the search warrant's legal authority to search the premises was over, the police could not remain in those premises to wait for Defendant and then attempt to search and arrest Defendant on the basis of that concluded, expired search warrant.

The search warrant authority granted to the investigating I.S.U. police in the instant case herein was ended and terminated when the Trial Judge granted Defendant's Motion To Quash that search warrant and suppress the evidence seized therefrom. From that point of time onward, the I.S.U. police had no legal authority to enter, be in, or remain in Defendant's dorm room, just as in People v. Boehm, op cited. With the evidence seized from Defendant's room suppressed by the pre-trial order granting Defendant's Motion to Quash the search warrant and the police standing back outside of Defendant's dorm room, as a result of same, no further arrest or search of Defendant's room or person could be executed by the police without a new, valid search warrant,

arrest warrant, Defendant's consent, probable cause with exigent circumstances, or a crime being committed in view of the investigating, arresting, searching police. Payton v. New York, 100 S. Ct. 1371, 1388, Ill. Rev. Stat. of 1981, Ch. 38, sec. 107-2, United States Constitution, Amendments IV, V, VI, XIV, U. S. C. A.

None of the above-mentioned circumstances existed or occurred as Defendant has shown in this Writ of Certiorari herein, and in Defendant's motions, briefs, and arguments below. Despite this basic error of substantive and procedural constitutional law according to the applicable cases cited herein, Payton, et al, evidence seized illegally from Defendant's person was used at trial to convict him, which evidence also forced Defendant to take the stand in his own defense thereby incriminating himself.

According to Harrison v. U. S., (1968), 392 U. S. 219, 88 S. Ct. 2008, People v. Wilson, (1975), 60 Ill. 2d 235 and People v.

Stiles, 95 Ill. App. 3rd 959 (1981), the State must prove by clear and convincing evidence that the wrongfully obtained fingerprint evidence did not induce Defendant to testify at trial. No such proof or offer was made by the State to prove same, satisfying this clear and convincing evidentiary burden upon the State showing that their illegal seizure and illegal use of the seriously damaging fingerprints of Defendant did not induce him to testify at trial in his own defense.

Without the illegally seized evidence being used by the State at trial, the only evidence remaining to connect Defendant with the crimes charged in this case was purely circumstantial.

Hence, Defendant's arson conviction should be reversed as a matter of law herein for all the foregoing reasons by authority of Payton, et al, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution; Davis v. Mississippi, Wong Sun, Mapp, Weeks, et al.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: Bloomington, Illinois
DECEMBER 13, 1983

Respectfully submitted,

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JOHN NAYLOR
Of Counsel

A P P E N D I X

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL

CIRCUIT COUNTY OF MC LEAN

THE PEOPLE OF THE STATE OF ILLINOIS	)	
v.	)	NO. 81 CF 410
MARK BLUMENTHAL	)	
Defendant	)	

MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED AND TO QUASH A SEARCH WARRANT SUBSEQUENTLY ISSUED THERETO

Now comes the Defendant, MARK BLUMENTHAL, by and through his Attorneys, Pratt, Larkin, Sternberg & Finegan, P.C. and respectfully moves this Honorable Court to quash a search warrant issued on October 27, 1981 by the Honorable W. Charles Witte for the search of (1) A dorm room located at 851 Manchester Hall at Illinois State University, Normal, McLean County, Illinois, (2) A locker room area located on the East end of the eighth floor of Manchester Hall, including lockers contained therein numbered 831A-856B, and to suppress as evidence against Mark Blumenthal in any

criminal proceeding and all items seized during the execution of said warrant including but not limited to the following:

1. One two and a half gallon metal gas can, "BALKAMP GASOLINE" with nozzle, yellow and red in color, containing a large amount of liquid.

2. One combination padlock as cut from the handle of locker 856A.

3. One pair of blue jeans.

4. One folded piece of paper (discolored and emitting a strong odor of suspected gasoline).

5. An I.S.U. Class Schedule containing written 41 O 14 (a possible combination of padlock).

6. A photograph of computer programming card with numbers 856A thereon.

7. A computer programming card with 856A thereon. (not seized)

As grounds for the Motion, the Petitioner alleges that the search and seizure was originally conducted without a warrant and was

illegal in that: (1) the aformentioned search was not made instant to a lawful arrest and (2) the aforementioned search was not made with the consent of the Defendant, (3) the Defendant states that the property in question was seized in violation of the Defendant's rights under the Fourth Amendment to the Constitution of the Unites States and Section 6 and 10 of Article 2 of the Constitution of the State of Illinois. Further, that once a warrant was issued herein, the search and seizure with a warrant was illegal because the warrant is insufficient on its face, there is no probable cause for its issuance, and it violates the Petitioner's rights under the Fourth Amendment to the Constitution of the United States and Section 6, Article 2 of the Constitution of the State of Illinois and Chapter 38, Section 108-3, Ill. Rev. Stat., in the following respects:

1. The complaint for the search warrant does not state facts sufficient to show probable cause for issuance of a warrant to search the premises in question.

2. The complaint for the warrant is based upon hearsay in its entirety.

3. There is no substantial basis clearly indicated in the complaint for the warrant to credit the hearsay.

4. There is no representation of past reliability of the information used in the complaint for the warrant.

5. There is no independent corroboration by the affiant of the facts alleged in the complaint.

6. The complaint alleges only conclusions of the affiant.

7. The police officer, Donald W. Knapp, was not sworn to the affidavit and the facts therein.

8. There are no facts alleged in the complaint regarding the acquisition by Donald Knapp that he had personal knowledge of the alleged presence of the items requested to be seized at the alleged address.

9. Items to be searched were not clearly indicated with adequate specificity.

10. Items seized or photographed were not included in the items requested to be seized or searched.

WHEREFORE, the Petitioner prays that the search warrant issued in the entitled case be quashed and that the evidence obtained in the execution thereof be suppressed.

MARK BLUMENTHAL, DEFENDANT

BY: Alan J. Sternberg
His Attorney

Alan L. Sternberg
Pratt, Larkin, Sternberg & Finegan, P.C.
102 S. East St., Suite 200A
Bloomington, Illinois 61701
Phone: (309) 828-2302

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, hand delivered, Bloomington, Illinois on the 4th day of December 1981
Katherine Feasley

STATE OF ILLINOIS) IN THE CIRCUIT COURT
COUNTY OF McLEAN) OF THE ELEVENTH
JUDICIAL CIRCUIT

APPLICATION OF SEARCH WARRANT

A. Applicant: Donald W. Knapp 105 General Services Bldg., 1.
Police Officer at Illinois State University

B. Place(s) or Object(s) to be Searched: 1) A Dorm Room located at 851 Manchester Hall at Illinois State University, Normal, McLean County, Illinois and 2) a locker room area located on the east end of the 8th floor of Manchester Hall, including lockers contained therein numbered 831A-856B.

C. Items or Materials to be Seized:

1) Gasoline or other similar flammable liquid.

2) Any containers for above mentioned gasoline or other flammable liquids.

3) Any other items, including clothing, which may contain gasoline or the odor of gasoline.

which are believed to consititute evidence of the offense(s) of arson and aggravated arson.

D. Applicant has probable cause to believe said items or materials are located on, at, or within the place(s) or object(s) to be searched based on the following: Applicant, Donald L. Knapp, is a police officer at Illinois State University, and has been so employed for approximately 10 years. Applicant was notified shortly after 5:00 a.m. this morning, October 27, 1981, of a suspicious fire on the 17th floor of Manchester Hall, a dorm on the campus at Illinois State University, Normal, McLean County, Illinois. The initial investigation disclosed that a fire was deliberatly set in front of the door of room #1735, which is the room of Kyle Kent and Bill Flessner. The fire burned the door to 1735 as well as an appr. 20 sq. ft. area outside the door, and charred the inside of the door in addition to damaging

an appr. 8 sq. ft. area inside the room on the floor. The fire was discovered by residents of the 17th floor of Manchester Hall after an explosion was reported by several residents. Specific investigation of the fire scene disclosed to applicant and Jodine Sipes, a former crime scene investigator, a strong odor similar to gasoline and a partially burned and exploded aerosol can of Gillette Right Guard deodorant just outside the door to room 1735. One resident of room #1735 was present at the time of the fire, but was inside the room asleep. Kyle Kent was seriously injured when he ran from the room; he is presently hospitalized with serious burns on his feet.

During the course of the investigation this morning, applicant became aware of an ongoing animosity between one of the occupants of room #1735, Bill Flessner, and an occupant of room #851, at Manchester Hall, named Mark Blumenthal. This dispute

centers around their mutual acquaintance of a female resident of room #1754, Lynn Maddox; and specifically deals with an article of personal clothing belonging to Lynn Maddox which Bill Flessner has retained from a previous relationship with her. Lynn Maddox presently is the girlfriend of Mark Blumenthal.

As part of a further investigation, applicant has sought to find a source and container for the gasoline used to commit the arson herein. Applicant is aware from his experience that gasoline is a substance not commonly found in university residence halls. Applicant found Mark Blumenthal in his room #851 shortly after the fire with his girlfriend, Lynn Maddox. During the course of conversations with Lynn Blumenthal, he has denied setting the fire, he has disputed the existence of a feud, and has refused permission to applicant to search room #851, even though applicant has personally assured Mark Blumenthal that

applicant was not interested in whether drugs or alcohol was present in room #851. Room #851 has been secured by Illinois State University police personnel since appr. 7:00 a.m. this morning.

Applicant was informed by Craig Jarva, an 8th floor mananagment assistant in Manchester Hall, of an odor of gasoline coming from a locker room located appr. 40 ft. down a hallway from room #851 which is the rest room/locker room designated for use by residents in the east wing of the 8th floor of Manchester Hall. Room #851 is located in said east wing. Applicant, in addition to smelling said odor of gasoline in the locker room, is aware that Mark Blumenthal maintains a locker in that locker room. Craig Jarva has stated he first noticed the smell of gasoline at approximately 5:00 a.m. this morning. The locker room has also been secured since appr. 7:00 a.m.

Applicant has learned of laboratory testing done on samples of carpeting recovered immediatly outside the door of room #1735. I.S.U. Professor of Chemistry, Michael Karr, who performed the analysis, has stated said sample contained evidence of gasoline. Testing of samples from the urinal drain and floor drain recovered from the locker room was negative, which leads applicant to believe that the source of the gasoline smell in the locker room is still present therein.

The roommate of Mark Blumenthal, Kevin Fahling stated to applicant this morning that "I think he (Blumenthal) might have done it (arson)" but refused to further elaborate indicating he didn't want to be responsible for seing his roommate (Blumenthal) hurt.

Donald W. Knapp

Applicant's Signature

Subscribed and sworn
to before me this 27
day of October, 1981,
12:05 p.m.

W. Charles Witte
Judge

STATE OF ILLINIOS)	IN THE CIRCUIT COURT OF
)	THE
COUNTY OF McLEAN)	ELEVENTH JUDICIAL COURT
THE PEOPLE OF THE STATE OF ILLINOIS)	

SEARCH WARRANT

TO ALL PEACE OFFICERS OF THE STATE:

On this date Donald L. Knapp has subscribed and sworn to an Application for Search Warrant before me. Upon examination of said Application, I find it states facts sufficient to establish probable cause for the issuance of a warrant to search the following described location(s) or object(s) for the items listed.

I, THEREFORE, COMMAND THAT YOU SEARCH: (1) a dorm room located at 851 Manchester Hall at Illinois State University Normal, McLean County, Illinois and (2) a locker room area located on the east end of the 8th floor of said Manchester Hall, including lockers contained therein numbered 831A - 856B.

AND, IF FOUND, SEIZE THE FOLLOWING: (1) gasoline or other similar flammable liquid. (2) any containers for above mentioned gasoline or other flammable liquids. (3) any other items, including clothing, which may contain gasoline or the odor of gasoline.

SEARCH WARRANT

Page 2

People vs. _____

I FURTHER COMMAND that any material(s) or item(s) seized pursuant to this warrant be secured in a safe place and that an inventory or return of anything so seized be made before me or a court of competent jurisdiction without unnecessary delay.

ISSUED this 27 day of October, 1981 at 12:05 a.m./p.m.

W. Charles Witte

Judge

STATE OF ILLINOIS) IN THE CIRCUIT COURT OF
) THE
COUNTY OF McLEAN) ELEVENTH JUDICIAL CIRCUIT

RETURN AND INVENTORY OF SEARCH WARRANT

I, Donald W. Knapp, Police Officer Illinois State University, Normal, Illinois, do hereby certify that a Search Warrant was executed on the 27th day of October, 1981 by searching the following premises: 1. A dorm room located at 851 Manchester Hall at Illinois State University, Normal, McLean County, Illinois and 2. A locker room area located on the east end of the 8th floor of Manchester Hall, including lockers contained therein numbers 831A - 856B.

The following is a verified inventory of all the articles, items and things seized:

1. One 2 1/2 gallon metal gas can, "Balkamp Gasoline" with nozzle, yellow and red in color, containing a large amount of liquid.
2. One combination padlock as cut from handle of locker #856A.
3. One pair of blue jeans.

4. One folded piece of paper (discolored and emitting a strong odor of suspected gasoline.
5. One ISU class schedule containing written 41 0 14 (possible combination of padlock).

Donald W. Knapp, states that the above inventory is complete and correct pursuant to the Search Warrant issued by the Honorable W. Charles Witte, (Associate) Circuit Judge of the Eleventh Judicial Circuit, on October 27, 1981,

Donald Knapp

Signature

Subscribed and sworn to before me this 29th day of October 1981, at 8:40 a.m.

W. Charles Witte
Judge

STATE OF ILLINOIS) IN THE CIRCUIT COURT OF
) THE
COUNTY OF McLEAN) ELEVENTH JUDICIAL CIRCUIT

ORDER

Return of a certain Search Warrant issued upon complaint of Donald W. Knapp, Police Officer Illinois State University, Normal, Illinois, having been made to the undersigned under the provisions of 38 Ill. Rev. Stat. 108-11, 1979, and the recommendation of the State's Attorney of McLean County, State of Illinois;

IT IS HEREBY ORDERED that the custody of the articles, items, and things seized upon the execution of said Search Warrant, as shown by the Return and Inventory returned therewith, be taken by Donald W. Knapp, or his successor or assignees of the Illinois State University Police Dept., to be held as evidence until proper disposition can be made in accordance with law.

Entered the 29 day of October, 1981.

W. Charles Witte

Judge

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT COUNTY OF McLEAN

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs	)	No. 81 CF 410
MARK BLUMENTHAL,	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED
AND
MOTION TO QUASH ARREST

NOW COMES the Defendant, Mark Blumenthal, by and through his attorney, Harold M. Jennings, and respectfully moves this Honorable Court to suppress as evidence against Mark Blumenthal any and all items of tangible physical evidence and any and all items of intangible evidence seized and obtained as a direct result of the arrest of Defendant, Mark Blumenthal, on or about October 27, 1981, by officers and representatives of Illinois State University Security Police and any and other law enforcement officials, agents and servants then and there participating in said arrest and as grounds for so moving alleges and represents as follows:

1. That Defendant, Mark Blumenthal, was arrested without warrant or judicial process for his arrest at or about the hour of 1 o'clock P.M. on October 27, 1981, by persons purporting to be police officers in and for Illinois State University, Normal, Illinois.

2. That said arresting officers did not arrest the person of Defendant, Mark Blumenthal, on the basis of any criminal offense observed by said officers or committed in the presence of said officers.

3. That said law enforcement officers arrested the person of Defendant, Mark Blumenthal, without any court order, arrest warrant, or lawful process calling for the arrest and/or detention of said Defendant.

4. That said law enforcement officers arrested the person of Mark Blumenthal, Defendant, without reason to believe that any court, judicial officer, or any lawful process had been issued by a court of competent jurisdiction at the time and place of Defendant's arrest.

5. That said law enforcement officers arrested Defendant, Mark Blumenthal, allegedly and purportedly charging said Defendant with various criminal offenses including but not limited to aggravated arson and arson and that said arrest and detention was without said officers having probable cause to believe the said Defendant had in fact committed that offenses for which he was arrested and detained.

6. That as a direct and proximate result of the arrest and detention of Defendant, Mark Blumenthal, without probable cause for his arrest and without judicial process calling for his arrest, detention and custody, said law enforcement officers and officials therafter said arrest did take from and obtain from Defendant certain verbal statements which they may seek to use as evidence against said Defendant and that said law enforcement officials also caused said Defendant to be photographed and fingerprinted and that the taking of said fingerprints from the Defendant

constituted a seizure of items of tangible physical evidence from the person and presence of Defendant.

7. That the verbal statements taken from Defendant and the fingerprint evidence, imprints, rolled fingerprint cards, and inked fingerprint samples were seized from the presence of and person of Defendant without his consent and without order of court, without probable cause for Defendant's arrest and detention, and that further said evidence has been and will be used by the State against Defendant in his trial when in fact the taking of said evidence was illegally and unlawfully seized and illegally and unlawfully tainted by reason of the fact that Defendant was arrested, detained and placed in custody without probable cause and without process of court and that said evidence as hereinbefore described was obtained without any consent of Defendant and was from him taken involuntarily as a matter of a fact and as a matter of law and ought be suppressed as to its use in any subsequent trial or hearing against the Defendant.

8. That any and all fruits of any illegal and unlawful arrest of Defendant as hereinbefore described without probable cause and without judicial process or warrant constitutes the obtaining of evidence both tangible and intangible which is tainted as to its taking and seizure in the absence of probable cause so as to deprive Defendant if said evidence is used against him of his rights under the Fourth Amendment to the Constitution of the United States and Section Six and Ten of Article two of the Constitution of the State of Illinois. Further said seizure and taking of evidence constitutes a violation of Defendant's rights to substantive and procedural due process under the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE Defendant, Mark Blumenthal, prays that the evidence both tangible and intangible seized and taken from the presence and proximity of Defendant as a result of his arrest without a warrant and without probable cause and that the evidence thereafter obtained

as a result of or as the fruits of any illegal arrest and detention be held and found to be unlawfully seized and taken or so tainted as to deprive Defendant of his legal and Constitutional rights as aforesaid and Defendant prays that said evidence be suppressed and that Defendant's arrest be quashed and that any and all evidence direct or indirect, tangible or intangible, as to its uses against Defendant at any trial or subsequent hearing be suppressed.

Mark Blumenthal

Signature

STATE OF ILLINOIS)
) SS
COUNTY OF MC LEAN)

Mark Blumenthal, being first duly sworn on oath, deposes and states that he is the Defendant in the above entitled cause of action; that he has read the above and foregoing instrument by him subscribed and that it is true and correct to the best of his knowledge, information and belief.

Mark Blumenthal

Signature

Subscribed and sworn to before me this 2d day of February, 1982.

Alice Faye Smalley

Notary Public

Jennings & Thompson
107 North East
Bloomington, IL 61701
309-827-5425

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties

to the above cause by hand delivering same to their business address, as disclosed by the pleadings of records herein, on the 3 day of February, 1982.

Alice Smalley

IN THE CIRCUIT COURT
FOR THE ELLEVENTH JUDICIAL CIRCUIT OF ILLINOIS
McLEAN COUNTY, BLOOMINGTON, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	NO. 81-CF-410
MARK BLUMENTHAL,	)	
Defendant,	)	

ORDER

This cause comes on for hearing on Defendant's motions to suppress and quash. The Court has received certain evidence from Lt. Knapp and has considered such evidence along with argument of counsel and submitted briefs of law as to the reserved issues:

The following factual findings are made:

1. That at the time of arrest the officer was reasonably and in good faith acting upon the basis of a then valid search warrant.

2. That the arrest was predicated, in large part, upon the arresting officers observation of the computer card.

3. That the photographing of the computer card is a substantially less significant

intrusion than the seizure would be and would constitute a "minimal" intrusion under the law.

4. That the evidentiary value of the photograph is substantialy the same as the computer card itself.

5. That the photograph, fingerprints and arrest card of the defendant, were obtained incident to an arrest which was lawful when made.

This Court is impressed by the logic of the Peoples argument with regard to the exclusionary rule when strictly applied as has been the practice both in Illinois and most other States up to this time. The facts in this case demonstrate how significant evidence may become unavailable through such strict application of the rule. It does appear that some other jurisdictions have realistically stepped away from a rigorous and unvarying application of the rule. However, this trend does not appear to have reached the courts of review of Illinois. I do not believe that it is the perogative of the trial court to rule

contrary to established authority and therefore I do not so rule in this case. The rulings are therefore as follows:

1. Defendant's motion to quash the arrest is denied.

2. Defendant's motion to suppress the arrest photograph of the defendant, his fingerprints, and the arrest card record is denied.

3. Defendant's motion to suppress the photograph of the computer card is allowed.

DATED: March 10, 1982

Richard M. Baner

Circuit Judge

(hearing of the jury.)

They want to stay tonight, gentlemen, so, that solves our problem. The note that they passed out at 9:35 is:

We would like to continue this evening. We would also like a refreshment break.

What we are going to do, because of the temperature in the jury room, is move them to the jury assembly room where there are some windows to be opened and some refreshments. We are going to use that as the jury room during continued deliberations.

It is now 10:20 P.M. and the transcript of the testimony just arrived from Eureka about the same time that the Court was notified that the jury had returned a verdict which we are now awaiting.

(The following proceedings were had in the presence of the jury.)

Ladies and gentlemen of the jury, have you reached your verdict?

THE FOREMEN: Yes.

THE COURT: Would you deliver your verdict to the clerk, please?

Verdict of the jury reads as follows:

We, the jury, find the defendant, Mark Blumenthal, not guilty of the offense of aggravated arson.

That is signed by the foreperson and 11 other jurors.

Second verdict reads as follows:

We, the jury, find the defendant, Mark Blumenthal, guilty of the offense of arson.

That is signed by the foreperson and 11 other jurors.

The third verdict reads as follows:

We, the jury, find the defendant, Mark Blumenthal, guilty of the offense of criminal damage to property.

And that is signed by the foreman and 11 jurors. Is there any request to poll the jury?

MR. JENNINGS: None.

THE COURT: Ladies and gentleman of the jury, I would like to extend to you, since I am here again to do that, my thanks for your attention and cooperation throughout the trial and specifically with some of the physical

problems that you have had to put up with because of the temperature in the courthouse in the evening hours. I know I speak for counsel and for the defendant in expressing our thanks to you for your attention in this case and the lengthy period of time that deliberation has taken.

You are excused and because of the lateness of the hour I am going to indicate to you you do not need to report.

MR. JENNINGS: None. (Sentencing)

THE COURT: Sentence is as follows as to Count II. Oh, wait a minute. Court finds that imprisonment or periodic imprisonment is necessary for the protection of the public. And that straight probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice. The Court has considered the full panoply of sentences provided by law and as provided by the Department of corrections or other facilities.

As to Count II the Defendant is sentenced to a term of four years probation. The standard conditions of probation as set forth in the Probation Order printed form used in McLean County will apply.

In addition thereto, Court finds that the Defendant is not an appropriate candidate for straight probation. And again, the appellate Court, Fourth District specifically and amazingly similar case both as to its facts and as to the nature of the Defendant, that is People vs. Knowles, 70 Illinois Appellate Third has reversed a penitentiary sentence under very similar circumstances. For that reason, this court must conclude periodic imprisonment is the only effective and appropriate alternative to a penitentiary sentence.

As additional condition of probation, the Defendant is sentenced to a term of twelve months periodic imprisonment at the Decatur Community Correctional Center exclusive of any credit for time previously served, if any.

It is a futher condition that the Defendant not violate any of the rules and regulations of the Department, which rules are made at this time a part of the court file in this case. Copies of which are to be attached to the Probation Order. Those rules are entitled Resident's Manual, Decatur Community Correctional Center. And they contain ten pages.

In accordance with the Department's request an additional condition of periodic imprisonment as a condition of probation is that the Defendant submit to therapy while at the Center.

It is further ordered that following the Defendant's release from periodic imprisonment he must participate on at least a bi-monthly basis for a period of eighteen months in psychiatric or psychological counseling either through group or individual sessions.

And an additional condition of probation is that the Defendant is ordered to pay restitution on a regular installment basis to

the extent that he is from time to time able to do so. Based upon the information presently contained in the record, the Court will order restitution to those persons and in those amounts previously stated.

All cash bonds in excess of court costs are applied to payment of restitution. Since it is presently impossible to accurately ascertain the full extent of the Defendant's ability to satisfy the balance of the restitution more promptly than will be ordered, he is allowed the maximum period of five years to pay the balance due. That is to be paid by even payments which are to be made each month of the last forty-eight months of that five-year period.

With regard to Count III, Defendant is sentenced to thirty months probation with each and all of the conditions applicable to Count II.

Department of corrections is ordered to administer Defendant's financial affairs pursuant to Chapter 38, Section 1005-7-6. And

they are further ordered to provide monthly reports and a final report in accordance with Administrative Rule 80-28. It is the recommendation of this Court to the Department, although not the Order of the Court, that the Defendant be granted a work release leave at the time of the birth of his expected child.

This Court's Order shall serve as a mittimus in acordance with Administrative Order 80-23.

Defendant is assessed costs of this proceeding. No fine is ordered.

Anything further, Gentlemen?

MR. DAVIS: No, Your Honor.

THE COURT: Court mittimus will issue today.

MR. JENNINGS: I would like the mittimus stayed if I could, Judge, for about three or four days simply to have an opportunity to discuss with my client and my client's family whether they wish to pursue any further legal remedies. And also to if they would elect not to do that, to make some arrangements with

respect to his schooling today and tommorrow since he is regularly enrolled in school in Chicago. And I would suggest maybe Tuesday or Wednesday of next week if that is okay.

THE COURT: What is his status in school at the moment? Is he in the midst of school?

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62706

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

June 6, 1983

Received June 7, 1983

COUNSEL WILL PLEASE TAKE NOTE:

If you intend to appeal to the Supreme Court we request that you file your affidavit of intent in 28 days from the date of this judgment. (Rule 368 (b))

A petition for rehearing must be filed within 21 days (by June 27, 1983) from the date of this judgment. (Rule 367(a))

IF NEITHER FILED our mandate will issue to the Circuit Clerk on July 4, 1983.

IF PETITION FOR REHEARING IS FILED our mandate will issue 7 days after the order, if denied, if no affidavit of intent is filed within those 7 days.

THIS TIME SCHEDULE DOES NOT SHORTEN THE TIME FOR FILING IN THE SUPREME COURT! It does prevent recall of mandate.

We solicit your cooperation in this schedule so that we may expedite our case load and issue our mandates as soon as possible.

Darryl Pratscher
Clerk, Appellate Court
Fourth District

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH JUDICIAL DISTRICT

General No. 4-82-0567

THE PEOPLE OF THE OF ILLINOIS Plaintiff-Appellee, v. MARK BLUMENTHAL Defendant-Appellant.	)	Appeal from Circuit Court McLean County 81-CF-410 Richard Baner Judge Presiding

FOR APPELLANT

Harold M. Jennings
Attorney at Law
107 North East
Bloomington, Illinois
61701

FOR APPELLEE

Ronald C. Dozier
State's Attorney
McLean County Law & Justice Center
Bloomington, Illinois
61701

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State's Attorneys Appellate Service Commission
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62701
John M. Wood
Staff Attorney

Rule 23 Order Filed: June 6, 1983

Justices: Honorable Albert G. Webber III, P.J.
Honorable Richard Mills, J.
Honorable Frederick S. Green, J.
Concurring

NO. 4-82-0567

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee, v. MARK BLUMENTHAl, Defendant-Appellant.	)))))))	Appeal from Circuit Court County of McLean No. 81CF410
June 6, 1983	)))	Honorable Richard M. Baner, Judge Presiding.

PRESIDING JUSTICE WEBBER delivered the order of the court:

Defendant was charged in the circuit court of McLean County with the offenses of aggravated arson and arson in violation of sections 20-1.1 and 20-1 of the Criminal Code of 1961. (Ill. Rev. Stat. 1981, ch. 38, pars. 20-1.1, 20-1.) A jury returned verdicts of not guilty of aggravated arson, guilty of arson, and also guilty of criminal damage to property which had been submitted to them as an included offense of arson. Judgment was entered on both

guilty verdicts by the trial court and the defendant was sentenced to 4 years' probation on the arson offense and 30 months' probation on the criminal damage offense, together with 12 months' periodic imprisonment and restitution.

Before proceeding further we must dispose of a matter which constitutes plain error. Defendant was first charged by information with aggravated arson only. Later a grand jury returned true bills against him for aggravated arson and arson. The information was then nol-prossed. At no time was he ever charged with criminal damage. As nearly as can be ascertained from the record, this offense was submitted to the jury as an included offense of arson. The jury instructions are not included in the record. However, the trial judge's reading of them is included and contains this statement: "The defendant is charged with the offenses of aggravated arson and arson, which includes the offense of criminal damage to property." The jury was provided with six

forms of verdict and directed to return a verdict "as to each charge."

In closing argument defense counsel stated to the jury, "*** I am suggesting to you that a just result in this case is to find Mark not guilty on the arson charges and guilty on the criminal damage to property charges because he acted recklessly."

As already described, the jury returned a not guilty verdict as to aggravated arson, and guilty verdicts as to arson and criminal damage. From this point on, everyone concerned, the trial judge, the prosecutor, defense counsel, treated these as separate charges and dealt with them as such. In appellant's brief, all three offenses are said to have arisen from indictments in McLean County and the page in the common law record is cited wherein only two charges, aggravated arson and arson, are covered by the true bills. No point has been raised and no argument has been made in this court that the included offense of criminal damage cannot stand in the

face of the conviction of the greater offense of arson.

There can be no doubt that the offenses grew out of the same act and that arson requires the proof of the same facts as criminal damage, with the additional proof of a more culpable mental state, "knowingly," and proof of $150 in damage.

We regard this as plain error and therefore on our own motion the judgment and sentence on the criminal damage to property conviction is vacated. People v. Pettus (1980), 84 Ill. App. 3d 390, 405 N.E. 2d 489.

The facts of the case are so extraordinary as to be grotesque. Defendant and his girlfriend, now his wife, were students at Illinois State University and lived in the same dormitory which housed about 800 students. Some other inhabitants of the building had obtained some of the girlfriend's clothing, presumably as a joke, and refused to return it. Various contretemps ensued, including a note given to the girlfriend, which, she testified,

upset her. The contents of the note were not revealed. Defendant became involved by reason of his relationship with her, and having become satisfied in his own mind as to who the culprit was, determined to create an explosion outside the dormitory room occupied by that offender. To this end, he obtained an aerosol can and some gasoline. He placed the can outside the door of the room, poured gasoline into the carpet surrounding it, and ignited the gasoline. All this occurred about 5 a.m. on October 27, 1981.

The ensuing brouhaha was apparently all that defendant anticipated and more. One occupant of the room, in attempting to escape the fire, was burned about the feet, and the damage to the building and its furnishings was $2,249.83.

Throughout his brief defendant keeps referring to this conduct as "reckless pranks," and an "immature, stupid, personal feud," and "headstrong revenge-scare-bomb." It is all that and more. Defendant ignores the potential

life-threatening danger to all the other inhabitants of the dormitory. His peevishness with the clothing purloiner might better have been settled in an alley on a one-to-one basis.

Defendant argues that while he admits to being reckless, he did not intend to start a fire and therefore the necessary mental state was not proved for arson. That state is "knowingly." We do not agree with him. His own testimony belies such a theory. He stated, "I planned -- Okay, what I meant was taking an aerosol can and setting fire around it in order to cause it to explode." Furthermore, the essence of the arson statute is the damage to the property of another; the means is by fire or explosive. (Ill. Rev. Stat. 1981, ch. 38, par. 20-1.) The record fully supports the fact that defendant acted knowingly and that damage was caused to the dormitory by fire and explosive without the consent of the owner.

Defendant's next argument is that acquittal on the charge of aggravated arson and guilty on the charge of arson constitute

inconsistent verdicts and the acquittal on the greater charge should act as a bar to conviction on the lesser. We again do not agree.

First, aggravated arson requires proof of a fact different from arson, i.e., that the defendant knows that one or more persons are present in the structure which he damages by fire or explosive. There is no legal inconsistency where crimes are composed of different elements. People v. Frazier (1975), 25 Ill. App. 3d 761, 324 N.E. 2d 10.

While it almost defies reason to say that the jury did not believe that the defendant knew other persons were present in the dormitory, it is the prerogative of a jury "'to exercise its historic power of lenity.'" (People v. Dawson (1975), 60 Ill. 2d 278, 281, 326 N.E. 2d 755, 757.) Although this jury was importuned to downsize its verdict to criminal damage only, it is obvious that it was unwilling to go so far, but was willing to extend some mercy.

Defendant's next arguments relate to search and seizure qestions. After the fire was extinguished, the police who had been summoned to the scene learned of the smell of gasoline in the washroom on the floor of the dormitory where defendant's room was located. In addition, while interviewing persons at the scene, police were told by defendant's roommate that "I think he (Blumenthal) might have done it." Defendant denied to the police that he had set the fire and refused permission to search his room. The police claimed to have become aware of the "feud" during the on-scene investigation, but it was specifically denied by defendant.

About noontime on October 27 the police obtained a search warrant for the washroom and for the defendant's room. It appears that each room on the floor has a locker in the washroom. The washroom was searched first and a can half-filled with gasoline was found in locker #856. Defendant's fingerprints were ultimately found on this can. Defendant's room was next

searched and a computer card with the handwritten legend "856" was discovered. Defendant was then arrested.

Defendant filed two motions: first, to quash the search warrant and to suppress the evidence seized thereby; second, to suppress the evidence seized as an incident to defendant's arrest and to quash the arrest. The trial court allowed the motion to suppress the search and the evidence siezed thereby as to the defendant's room, but not as to the washroom; it also denied the motion to quash the arrest and any fingerprints or photographs taken incident to the arrest. The court found that there was probable cause to search the washroom, but that there was no substantiated information regarding the "feud" and therefore the search of defendant's room was without probable cause.

The linchpin to the entire issue relates to the testimony of an officer at the motion to quash arrest. He stated that the finding of the computer card in defendant's room with the

legend #856 which corresponded with the locker number in which the gasoline can was found persuaded him to make the arrest.

Some brief background may be helpful in understanding the matter of the computer card. Defendant's roommate testified that during the evening before the fire at about 9:30 p.m. he called the defendant by telephone to complain about a can of gasoline which was in their room and which was giving off noxious odors. Defendant was in his girlfirend's room at the time and instructed the roommate to remove the can and place it in an empty locker in the washroom. He did so, placing the can in locker #856A; he then returned to the room and wrote "856" on a computer card and left the card on the defendant's desk.

Defendant argues that it is incongruous and inconsistent for the trial court to suppress the search as to his room but to refuse to quash his arrest without a warrant when at least part, if not the major part, of the probable cause to arrest was based on

evidence observed in the room. He maintains that the entry into his room was unlawful and no use can be made of any evidence gained thereby, including the fingerprints obtained at his booking.

The State justifies the arrest on several grounds. First, it analogizes to a grand jury proceeding in that a true bill returned upon incompetent evidence cannot be challenged. The analogy is not apt. The grand jury has a unique investigative function which must be carefully balaced against an individual's right of privacy. A grand jury's finding of probable cause is qualitatively different from that of an arresting officer.

The State also argues the "inevitable discovery" rule. (People v. Shaver (1979), 77 Ill. App. 3d 709, 396 N.E. 2d 643.) However, an examination of the record indicates that this was not argued to the trial court and therefore it would be improper for us to consider it as the governing basis.

The State also raises the "good faith" exception to the exclusionary rule. In oral argument it was admitted that this was raised only because of Illinois v. Gates now on rehearing in the United States Supreme Court. (74 L. Ed. 2d 595.) This doctrine is not yet the law of Illinois, and it would be precocious of us to adopt it at this time.

Notwithstanding the officer's testimony regarding the computer card, we believe that there was sufficient other evidence to create probable cause to arrest without a warrant. An officer may have sufficient facts but may also conclude that those facts are insufficient to establish probable cause. In such a situation the court may place itself in the position of the arresting officer and in the light of the objective evidence substitute its judgment for that of the officer. People v. Moody (1981), 97 Ill. App. 3d 758, 423 N.E. 2d 566.

We have examined with care the officer's application for the search warrant and find much significant evidence there. For example,

the roommate's statement set forth above; the officer's confrontation of the defendant with the information about the "feud" which defendant denied; information about a gasoline odor emanating from a washroom about 40 feet from defendant's room. The totality of the circumstances as recited in the application and known to the officer at the time of arrest was sufficient, apart from the computer card, to create a basis for probable cause. While the officer's subjective belief is relevant to the question of probable cause, it is not controlling. Moody.

For all the foregoing reasons, the judgment and sentence for the offense of arson is affirmed.

Affirmed in part and vacated in part.

MILLS and GREEN, JJ., concur.

DATE: July 5, 1983

RE: People v. Blumenthal
General No. 482-0567
McLean 81-CF-410

TO COUNSEL:

I have today entered the following order of this court in the above cause:

"Petition for Rehearing denied. The court notes violations of Supreme Court Rules 341(a) and 367(a)."

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:pd

To: Harold M. Jennings
Ronald C. Dozier
Robert J. Biderman/John M. Wood

October 4, 1983

Mr. Harold M. Jennings
Attorney at Law
107 North East
Bloomington, IL 61701

No. 58829 - People State of Illinois, respondent, vs. Mark Blumenthal, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

P.S. The Mandate of this court will issue to the Appellate Court on October 26, 1983.

October 28, 1983

Mr. Harold M. Jennings
Attorney at Law
107 North East
Bloomington, IL 61701

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 58829 - People State of Illinos, respondent vs. Mark Blumenthal, petitioner.

Enclosed is a copy of an order entered today.

A certified copy of this order has been forwarded to the Clerk of the Appellate Court, Fourth District

JH:th
cc: SAASC - Springfield, Il (Robert J. Biderman)

No. 58829

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois,	)	
Respondent,	)	Appeal from Appellate Court
vs.	)	Fourth District
	)	482-0567
Mark Blumenthal,	)	81 CF 410
Petitioner	)	

ORDER

This matter has come for consideration upon the motion of petitioner to recall the mandate of this Court pending application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is recalled & stayed pending the filing of an aplication for certiorari or the expiration of the period within which said application may be filed. If certiorari is applied for, the mandate of this Court shall, upon proof of such application being made by affidavit filed with the Clerk of this Court, be stayed pending resolution of the

United States Supreme Court of such application. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which certiorari may be sought.

Robert C. Underwood

Justice, Supreme Court of Illinois

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No. 83-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARK BLUMENTHAL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1983

MARK BLUMENTHAL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment of the Appellate Court, Fourth District, because petitioner does not present an issue worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, Fourth District, opinion in *People v. Blumenthal*, No. 4-82-0567 (4th Dist. 1983). A copy of the opinion is included with petitioner's petition. The petitioner's petition for leave to appeal to the Supreme Court was denied October 4, 1983.

JURISDICTION

The jurisdictional requisites are set forth in the petition. However, the following argument makes clear that the petitioner has not shown any reason for this Court to exercise its discretion to grant the Petition for Writ of Certiorari.

STATEMENT OF FACTS

The following facts are from the Illinois Appellate Court opinion:

The facts of this case are so extraordinary as to be grotesque. Petitioner and his girlfriend, now his wife, were students at Illinois State University and lived in the same dormitory which housed about 800 students. Some other inhabitants of the building had obtained some of the girlfriend's clothing, presumably as a joke, and refused to return it. Various contretemps ensued, including a note given to the girlfriend, which, she testified, upset her. The contents of the note were not revealed.

Petitioner became involved by reason of his relationship with her, and having become satisfied in his own mind as to who the culprit was, determined to create an explosion outside the dormitory room occupied by that offender. To this end, he obtained an aerosol can and some gasoline. He placed the can outside the door of the room, poured gasoline into the carpet surrounding it, and ignited the gasoline. All this occurred about 5 a.m. on October 27, 1981.

The ensuing brouhaha was apparently all that defendant anticipated and more. One occupant of the room, in attempting to escape the fire, was burned about the feet, and the damage to the building and its furnishings was $2,249.83.

After the fire was extinguished, the police who had been summoned to the scene learned of the smell of gasoline in the washroom on the floor of the dormitory where the defendant's room was located. In addition, while inter-

viewing persons at the scene, police were told by defendant's roommate that "I think he (Blumenthal) might have done it." Petitioner denied to the police that he had set the fire and refused permission to search his room. The police claimed to have become aware of the "feud" during the on-scene investigation, but it was specifically denied by the defendant.

About noontime on October 27 the police obtained a search warrant for the washroom and for the defendant's room. It appears that each room on the floor has a locker in the washroom. The washroom was searched first and a can half-filled with gasoline was found in locker #856. Petitioner's fingerprints were ultimately found on this can. Petitioner's room was next searched and a computer card with the handwritten legend "856" was discovered. Petitioner was then arrested.

Some brief background may be helpful in understanding the matter of the computer card. Petitioner's roommate testified that during the evening before the fire at about 9:30 p.m. he called the defendant by telephone to complain about the can of gasoline which was in their room and which was giving off noxious odors. Petitioner was in his girlfriend's room at the time and instructed the roommate to remove the can and place it in an empty locker on the washroom. He did so, placing the can in locker #856A; he then returned to the room and wrote "856" on a computer card and left the card on the defendant's desk.

Petitioner filed two motions: first, to quash the search warrant and to suppress the evidence seized thereby; second, to suppress the evidence seized as an incident to defendant's arrest and to quash the arrest. The trial court allowed the motion to suppress the search and the evi-

dence seized thereby as to defendant's room, but not as to the washroom; it also denied the motion to quash the arrest and any fingerprints or photographs taken incident to the arrest. The trial court found that there was probable cause to search the washroom, but that there was no substantiated information regarding the "feud" and therefore the search of defendant's room was without probable cause.

The linchpin to the entire issue related to the testimony of an officer at the motion to quash arrest. He stated that the finding of the computer card in defendant's room with the legend #856 which corresponded with the locker number in which the gasoline can was found persuaded him to make the arrest.

The appellate court found that, notwithstanding the officer's subjective belief about the presence of probable cause, there was sufficient other evidence to create probable cause to arrest defendant. When the officer applied for the search warrant he possessed the evidence of the roommate's statement, the evidence of the feud, the confrontation with the defendant about this evidence which defendant denied, and information about the gasoline odor emanating from a washroom about 40 feet from the defendant's room. The totality of this evidence created a basis for probable cause and rendered the arrest valid.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the decision below. The issue was correctly decided by the Appellate Court of Illinois and does not present the kind of novel or pressing problem worthy of review by this Court.

With warrant in hand, the police searched petitioner's Illinois State University dormroom and the washroom down the hall; during the search they arrested the petitioner. Before trial, petitioner moved to quash the searches and the arrest and suppress any evidentiary fruits obtained therefrom.

It is not exactly clear from the petition just what the fruits were here or how they were disovered. The appellate court opinion is more helpful in this matter. (Appellate Opinion, petition at 85-86). The search of the washroom turned up an incriminating can half-filled with gasoline in locker #856 and petitioner's fingerprints which were ultimately found on the can. The search of the dormroom turned up a computer card with the handwritten legend "856", but this was never used against petitioner. The arrest resulted in incriminating fingerprints taken incident to arrest.

The trial court quashed the warrant to search his dormroom and suppressed the fruits of this search, but approved of the search of the washroom and the petitioner's arrest and permitted the evidence obtained from these to be introduced as evidence against petitioner. The appellate court also upheld the arrest and washroom search.

Petitioner's argument seems to be as follows: since the police were inside the dormroom pursuant to a search

warrant when they arrested petitioner, and since that search warrant was later held invalid, in theory the police should be deemed as standing outside the dormroom without an arrest warrant and without petitioner's consent to enter and without exigent circumstances—thus without a basis for arrest or for using the fruits of the arrest against him. According to petitioner, this violates this Court's ruling in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (warrantless, nonconsensual entry into suspect's home to make routine felony arrest violates Fourth Amendment), as well as Illinois's own rulings in *People v. Abney*, 81 Ill.2d 159, 407 N.E.2d 543 (1980) and *People v. Eichelberger*, 91 Ill.2d 359, 438 N.E.2d 140 (1982), which follow *Payton*.

The trouble with this claim is that it misapprehends what happened in the Illinois Appellate Court. The appellate court's analysis made clear that the application for search warrant and the neutral magistrate's subsequent decision to issue the warrant satisfied this Court's concern underlying *Payton*. Here we had a determination by a neutral magistrate, thus satisfying *Payton*'s legal requirement. And we had the actual existence of probable cause to arrest, thus satisfying *Payton*'s factual requirement.

The appellate court reasoned that at the time the officers sought the neutral magistrate's determination of probable cause, there existed probable cause sufficient to effectuate an arrest. This was evidenced by the application for warrant, (contained in petition at 45). This case is distinguishable from instances where the police feel evidence will be found at some specific locale without yet being sure who committed the crime. Rather, the application for warrant makes clear that the police felt petitioner

Mark Blumenthal committed the arson and this was the reason why they requested permission to search his dormroom. It was on this application and on this basis that the warrant was granted.

Before trial, the warrant to search was quashed. Later on appeal, the appellate court was not asked to address whether this search warrant was properly quashed. But it was asked to address whether the arrest was valid and the court deemed the arrest valid on the basis of the application by the police officers. In holding that the application to the neutral magistrate supported the warrant, the appellate court relied on the following evidence contained on that application: 1) the petitioner's roommate's statement to the police that "I think he [Blumenthal] might have done it," 2) the officer's confrontation of the petitioner with the information about the "feud", providing the police the opportunity to view petitioner's reaction to the information, including petitioner's denial, 3) the information that a smell of gasoline was coming from a washroom on the floor of the dormitory where petitioner's room was located, turning out to lie just 40 feet from petitioner's dormroom. Thus "the totality of the circumstances as recited in the application and known to the officer at the time of the arrest" was sufficient to justify the arrest. (Appellate Opinion, petition at 90).

It becomes clear then that implicitly the appellate court found that the warrant to search had been validly issued in the first place. The court was not explicit about this because that question was not directly presented. But this conclusion is the only logical one—the court could not logically hold on the facts of this case that there was probable cause that petitioner committed the crime but no probable cause to permit a search of his dormroom.

This logic supports what the appellate court did make explicit—that the arrest was not tainted by any illegal search.

Thus there is no *Payton* problem. The police first went to a neutral magistrate to secure a warrant. They obtained a warrant on facts sufficiently demonstrating probable cause to arrest petitioner. Thus they complied with *Payton*'s requirement "to interpose the magistrate's determination of probable cause between the zealous officer and the citizen" before making an arrest. *Payton*, 445 U.S. at 602. Indeed, in *Payton*, this Court remarked that "an arrest warrant requirement may afford less protection than a search warrant requirement." *Payton*, 445 U.S. at 602. In light of the appellate court's ruling, it is apparent that petitioner had the benefit of the greater protection.

Since there is no violation of *Payton* and since there is nothing this Court could add to the *Payton* rule if it were to take review of this case, the petition should be denied.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition because the issue it presents is not worthy of review by this Court.

Respectfully submitted,

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NO. 83-1014

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1983

MARK BLUMENTHAL,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI ON
APPEAL FROM THE SUPREME COURT
OF ILLINOIS

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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JOHN NAYLOR
Of Counsel

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3. Chimel v. Calilfornia, 395 U.S. 752, 89 S.Ct. 2034, (1969).
4. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, (1971).
5. Davis v. Mississippi, 394 U.S. 723 89 S.Ct. 1394 (1969).
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7. Harrison v. United States, 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008, (1968).
8. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168.
9. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, (1948).
10. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

11. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980).

12. People v. Abney, 81 Ill.2d 159, 407 N.E. 2d 543 (1980).

13. People v. Eichelberger, 91 Ill. 2d 359, 438 N.E. 2d 140, (1982).

14. People v. Peter, 55 Ill. 2d 43, 303 N.E. 2d 398, (1973).

15. People v. Wilson, 60 Ill. 2d 235, 326 N.E. 378, (1975).

16. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, (1966).

17. Steagald v. United States, 102 S.Ct. 1642, (1981), 451 U.S. 216.

18. United States v. DI RE, 332 U.S. 581, 68 S.Ct. 222.

19. United States v. Rosselli, 506 F.2d 627, Seventh Circuit, (1927).

20. United States v. Rubin, 474 F.2d 262, 3rd Circuit, (1973).

21. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970).

22. Wong Sun v. United States, 371 U.S. 473, 83 S.Ct. 403 (1963).

Statutes

United States Constitution, U.S.C.A., Amendments IV, V, VI, XIV.

Illinois Revised Statutes of 1981, Chapter 38, Section 107-2.

Illinois Revised Statutes of 1981, Chapter 38, Section 114-12.

REPLY BRIEF TO THE BRIEF FOR RESPONDENT IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner asks this Court permission to file this Reply Brief to respond to Respondent's novel contention in its Brief in Opposition that the neutral magistrate who reviewed the search warrant application, was also reviewing the probable cause issue for Petitioner's arrest, thus satisfying Payton's requirements for arrest warrants in routine felony arrests. Such was not the case, nor was this issue argued below.

STATEMENT OF FACTS

Petitioner wishes to rely upon his submitted statement of the case, found on page 13 of the Petition for Writ of Certiorari.

However, Petitioner would also like to take exception to the intemperate choice of words in Respondent's Brief in Opposition and the mis-description of the case contained therein. Petitioner concedes that as in most criminal cases and in particular the instant case, a personal and circumstantial tragedy did occur in this cause. Defendant regrets the circumstances of the offense; however, the precipitating events were not completely within Defendant's control and Petitioner-Defendant urges this Court to keep in mind that Defendant was found not guilty by a jury on the trial of this cause as to the primary offense of aggravated arson. The jury in returning a verdict of not guilty apparently agreed with the Defendant's evidence and contention that a retaliatory prank precipitated by another student's attack upon Defendant's girl friend, now wife, was the precipitator of the events in question which caused a fire and damage in the college dorm in question. Petitioner has never

attempted to excuse or make light of what he, himself has described as a stupid, immature and reckless act in response to an attack against his financee. The Respondent states that use of the Appellate Court's unsuitable and intemperate description of this case is in fact a mis-description and in the judgment of Petitioner in derogation of this Court's Rule 34(.6) by its repetition in the State's Brief and Opposition.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Because of the unique timing and sequential order of the searches, arrest, and eventual Trial Court suppression of part of the police searches in this case, the constitutional issues contested herein need or deserve to be reviewed by this Supreme Court, contrary to Respondent's contention in its Brief of Opposition. Petitioner has not found any previously decided cases with the exact search, arrest, and suppression order of events as occurred in this cause. Hence a novel issue for review may be present here which this court may wish to exercise its discretion to decide as per Supreme Court Rule 17(.1), and Rule 17(.1)(c).

Respondent's Brief in Opposition to Petitioner's Writ for Certiorari, adequately summarizes Petitioner's basic constitutional contentions on Page 6 and 7 of Respondent's Brief. That contention is that the Petitioner-Defendant's basic constitutional

rights under the 4th, 5th, 6th, and 14th Amendments were violated when quashed, suppressed evidence was used by the police to base its arrest of defendant upon. Such an illegal arrest should have been quashed and the resulting evidence flowing unattenuatedly from that arrest also suppressed and returned to Defendant as a matter of law under the line of cases flowing from Wong Sun v. U.S., 371 U.S. 473, 83 S.Ct. 403 (1963); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961); Davis v. Mississippi, 394 U.S.723, 89 S.Ct. 1394 (1969); Byers v. U.S., 273 U.S. 28, 47 S.Ct. 248; U.S. v. DI RE, 332 U.S. 581, 68 S.Ct. 222.

The Trial Court at the Pre-Trial Quash and Suppression Hearing, granted Defendant's Motion to Suppress Evidence Illegally Seized from Defendant's dorm room, but erroneously refused to quash the immediately ensuing arrest of Defendant in his dorm room, which arrest was clinched by evidence illegally observed or seized in that dorm room by the Illinois State

University police. See pages 65, 66, and 67 of Petitioner's Writ of Certiorari.

The convinction of Defendant based on evidence seized from Defendant's person during this illegal arrest, namely his fingerprints, which the police previously had no record of, is contrary to the rules of constitutional law as they have evolved from the previously cited cases of Wong Sun, Mapp, Davis, Byers, and DI RE. This conviction of Defendant based upon unconstitutionally seized evidence by the Illinois courts is in direct conflict with the aforementioned decisions of the U.S. Supreme Court, and deserves review by Defendant's Petition for Certiorari under this Court's rule 17(.1)(c) also.

This Court's ruling in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), was also violated by the arresting Illinois State University police when they entered Petitioner's dorm room without a warrant for his arrest, since there were no

no exigent circumstances present, necessitating such a warrantless entry. The I.S.U. police had previously "secured" or taken over Petitioner's dorm room without a warrant or probable cause at 7 a.m. that morning, refusing entry to Petitioner and everyone else. This type of immobilization or securing of Defendant's dorm room has been called a seizure by previous Illinois and United States Supreme Court decisions. People v. Peter, 55 Ill. 2d 443, 303 N.E. 2d 398 (1973); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975.

If this warrantless police lock-in, lock-out, was not a constitutionally unreasonable search or seizure in itself, such an immobilization of Petitioner's dorm room was at least clear proof that no exigent circumstancs were present in this cause, because any evidence that might have been destroyed or removed from Petitioner's room was effectively sealed by this police takeover.

Despite the recent Illinois Supreme Court cases of People v. Abney, 81 Ill. 2d 159, 407 N.E. 2d 543. (1980), and People v. Eichelberger, 91 Ill. 2d 359, 438 N.E. 2d 140 (1982), which discussed Payton's ruling and its guiding principles extensively, the Illinois Supreme Court in this cause denied Petitioner's Leave to Appeal to that Court. Such denial by the Illinois Supreme Court on October 4, 1983, let stand the manifestly erroneous affirmance by the Illinois Appellate Court of the Trial Court's conviction of Petitioner therein, which was based upon evidence illegally seized from Defendant following his warrantless arrest in his dorm room.

Such actions by the Illinois Courts were clearly contrary to constitutional principles required in arrest and search procedures by the police since the Payton decision. Abney and Eichelberger, op. cited, p. 168, and p. 367, both respectively, state that the principles of the exigent circumstances rule enunciated in

Payton have been judicially engrafted on our Illinois arrest statute. Chapter 38, Section 107-2, Illinois Revised Statutes of 1981. Yet Petitioner's warrantless arrest in his room with no exigent circumstances present was allowed to stand by our Illinois courts in this cause.

Respondent's Brief in Opposition now attempts to say that Payton's principles were satisfied by the Illinois Appellate Court's action in reconstructing the determination of the amount of probable cause possessed by the I.S.U. police at the time of Defendant's arrest in his room at around 1 p.m., which had been secured by the police since 7 a.m. Respondent's Brief also misleadingly gives the impression on pages 7, 8, and 9, now, that the magistrate who issued the search warrants, was also acting on an arrest warrant application, or that a search warrant can serve the same purpose as an arrest warrant. Such was not the case, in fact, nor is it in law.

The search warrant applicant himself, I.S.U. police officer Donald Knapp, testified at the Pre-Trial Quash and Suppression Hearing, that he did not feel he had probable cause to arrest Petitioner until after the search of Defendant's room, which search was later quashed for lack of probable cause by the Trial Court Judge. The Trial Court Judge ruled at the Pre-Trial Hearing, timely Motioned for by Defendant in accordance with Illinois Revised Statutes of 1981, Chapter 38, Sec. 114-12, that the police possessed only a "mere suspicion" quantum of evidence prior to the police search of Defendant's dorm room.

Yet, this "mere suspicion" quantum of evidence was relied upon by the Illinois Appellate Court to justify Defendant's arrest as being based upon probable cause. Such a holding by the Illinois Appellate Court is in direct conflict with this Court's decision in Henry v. U.S., 361 U.S. 98. 80 S.Ct. 168, which held that an arrest with or without a warrant

must stand upon firmer ground than mere suspicion. Petitioner believes that it is incongruous and an error of law for the Illinois Appellate Court to hold that evidence insufficient to uphold a search warrant of Defendant's room can later be called sufficient to justify Petitioner's arrest, clinched on evidence seized during this quashed search.

Byers and DI RE, op. cited, have both ruled that an illegal search is not validated by what it turns up. Here Defendant's arrest was not clinched until the evidence illegally observed in Defendant's room was observed or seized by the I.S.U. police, which search was later quashed and suppressed. An illegal arrest should not be validated by what is discovered because of that arrest.

Steagald v. United States, 102 S.Ct. 1642, 451 U.S. 216, (1981), has recently ruled that the inconvenience of obtaining a search warrant at the same time as an arrest warrant was not that significant. Such a similar procedure

could have been followed by the Illinois State police in this cause since all of their investigation was done on a weekday during court hours in the same city as the county seat. The early morning securing of Defendant's room by the police and the continued presence of Defendant in his dorm room area during the day while the police were making their investigation and searches, clearly are important factual grounds requiring that Payton's principles requiring arrest warrants in such routine, non-exigent circumstances should have been followed by the I.S.U. police herein. See also Harris v. State, 452 U.S. 901, 101 S.Ct. 3025, 69 L.Ed. 2d 402. In United States v. Rubin, 474 F.2d 262, 3rd Circuit, (1973), on pages 266 and 267, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, (1969), and Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, (1970), are both discussed to show what kind of factual circumstances might require the police who have already

secured on arrest warrant, to also seek a search warrant for the home they will be serving their arrest warrant at. In Petitioner's case herein, counsel for same has found no other cases exactly like our facts which clearly show that an arrest warrant should also have been sought by the I.S.U. police at the time they applied for their search warrants.

Rubin goes on to state, on page 268, using this Court's delicate balancing of rights as discussed in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1829, (1966), Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, (1948), and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, (1971), that even the mere presence of probable cause, which was in doubt in this cause, does not provide the exigent circumstances necessary to justify a search without a warrant. Since Payton, probable cause has not dispensed with the necessity for arrest warrants, either, in the absence of

exigent circumstances, in routine felony arrests.

Since Petitioner's dorm room had been secured, sealed, and taken over completely by the I.S.U. police at 7 a.m., the morning of the fire and investigation, Petitioner's case clearly fits within the boundaries of situations described in Rubin, on pages 266, and 268, citing Chimel and Vale, op.cited. In Chimel, op.cited, p.395 U.S. at 768 N. 16, and 89 S.Ct. 2034, this Court stated that there was no showing that it would have been unduly burdensome for the police to have also obtained a search warrant, to go along with their arrest warrant. In Vale, 399 U.S. at 35, 90 S.Ct. at 1972, this Court stated, in suppressing the illegally seized evidence there, that there was lack of any evidence suggesting that it was impracticable for the police officers to obtain a search warrant, as well as their arrest warrants.

With language such as this, Petitioner contends that this Court has definitely ruled that there is a difference between a search warrant and an arrest warrant, and that one doesn't replace the need for the other, or serves the same purposes, as Respondent's Brief in Opposition erroneously contends, which contention was not made by Respondent in any court proceedings below.

Under the rules and reasonings of the decisions of this Court in the aforementioned cases of Rubin, Chimel, Vale, Schmerber, Johnson, Coolidge, and Payton, et al, op.cited, Petitioner's arrest should have been quashed because of the absence of an arrest warrant and any exigent circumstances. See also United States v. Rosselli, 506 F. 2d 627 (1974), p. 631.

Without the fingerprint evidence seized from Defendant's person following his unlawful arrest in his room at the conclusion of the quashed search, the State possessed only

circumstantial evidence, which did not link Defendant personally to the crime being investigated. Hence the fingerprints and Defendant's testimony at trial in his own defense were illegally tainted because they came, and flowed solely and unattenuatedly from, the exploitation of Defendant's arrest, which should have been quashed. Harrison v. U.S., 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1968). No clear and convincing evidence was produced by the State at trial to prove that Defendant's fingerprints and testimony came from an independent source either, as required by Illinois law. People v. Wilson, 60 Ill. 2d 235, 326 N.E. 2d 378 (1975).

CONCLUSION

Wherefore, Petitioner asks this Court to grant his Petition for Certiorari for the foregoing reasons.

Respectfully submitted,
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